UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

EQUAL EMPLOYMENT OPPORTUNITY	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 4:01CV0154JCH
	)	
EXEL, INC. d/b/a EXEL LOGISTICS, INC.	)	
	)	
Defendant.	)	

MEMORANDUM AND ORDER

Before this Court is Defendant Exel's Motion to Strike the Report and Testimony of Plaintiff's Proposed Expert Witness David J. Schreiber, M.D. (Doc. No. 78). For the reasons stated in this Memorandum and Order, Defendant's Motion is denied.

Background

Plaintiff EEOC sued Defendant Exel on behalf of former Exel employee Alan Gray, alleging violations of the Americans with Disabilities Act, 29 U.S.C. § 12112(a). The EEOC alleges that Exel violated the ADA by terminating Mr. Gray in 1996 because it regarded him as disabled due to the condition of his back, including congenital spinal stenosis.

The EEOC's medical expert, neurologist David J. Schreiber, M.D., examined Plaintiff in September 2001, reviewed Plaintiff's previous medical records, and wrote a report including his findings. The EEOC provided this report to Defendant Exel according to Rule 26 of the Federal Rules of Civil Procedure.

Discussion

Initially, Defendant moves to strike Plaintiff's expert based on noncompliance with Rule

26. In December 2001 and January 2002, the parties were engaged in a dispute regarding the disclosure of the list of cases in which Dr. Schreiber had previously testified. It appears that the EEOC did provided a list of cases to Exel a week before Dr. Schreiber's deposition, and apparently provided additional information about other cases after the deposition. Defendant claims that this late disclosure was prejudicial and provides grounds for striking the expert.

The record, however, contains no indication that Defendant was actually prejudiced in any way by these late disclosures. Defendant did not move to strike the expert or otherwise raise this issue around the time of Dr. Schreiber's deposition four months ago, and furthermore the EEOC notes that it had no objection to reconvening the deposition at a later date if necessary. **EEOC's Memorandum in Opposition at 9.** The Court finds that Defendant's claim of prejudice is groundless, and that the late disclosures provide no basis for striking Plaintiff's expert.

Defendant alternatively moves to strike Plaintiff's expert on the ground that Dr. Schreiber's testimony is not admissible under Federal Rule of Evidence 702, which governs admissibility of expert testimony. **Fed.R.Evid. 702**; **Lauzon v. Senco Products**, 270 F.3d 681, 686 (8th Cir. 2001).

"'Rule 702 reflects an attempt to liberalize the rules governing the admission of expert testimony.'" **Lauzon,** 270 F.3d at 686**, quoting Weisgram v. Marley Co.**, 169 F.3d 514, 523 (8th Cir.1999) aff'd, 528 U.S. 440, 120 S.Ct. 1011, 145 L.Ed.2d 958 (2000); see also **Daubert v. Merrell-Dow Pharmaceuticals**, 509 U.S. 579, 588 (1993). "The rule clearly 'is one of admissibility rather than exclusion.'" **Lauzon, id., quoting Arcoren v. United States**, 929 F.2d 1235, 1239 (8th Cir.1991).

Expert testimony must meet three prerequisites in order to be admitted under Rule 702. 4 **Lauzon, id., citing Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence § 702.02[3] (2001)**. First, evidence based on scientific, technical, or other specialized knowledge must be useful to the finder of fact in deciding the ultimate issue of fact; this is the basic rule of relevance. **Id**. Second, the proposed witness must be qualified to assist the finder of fact. **Id.** Third, the proposed evidence must be "reliable or trustworthy in an evidentiary sense, so that, if the finder of fact accepts it as true, it provides the assistance the finder of fact requires ...." **Id.; see also Daubert**, 509 U.S. at 591.

"The basis for the third prerequisite lies in the recent amendment of Rule 702, which adds the following language to the former rule: '(1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.'" **Lauzon**, 270 F.3d at 686, quoting **Fed.R.Evid. 702.** "The language of the amendment codifies **Daubert** and its progeny." **Id**..

Defendant initially contends that Dr. Schreiber's testimony is not relevant, since it is limited to the doctor's assessment of Mr. Gray's current physical condition rather than Mr. Gray's condition at the time he was terminated from Exel in 1996. The record indicates, however, that Mr. Gray's *congenital* spinal stenosis and its effect on his physical condition is a primary issue in the case, and indeed was the basis for his termination from Exel. **See, e.g., Letter from General Manager E. Aldon Woolley to Mr. Alan Gray**, **Exh. 6 to Defendant's Motion to Strike** ("We just received Dr. Mannis' medical report of 11-21-96 (see attached) which indicates that he does not believe you will be able to continue work as a forklift driver

based on his diagnosis of congenital spinal stenosis.")

With respect to this issue, Dr. Schreiber's report states:

> Therefore, based upon the history, physical examination, as well as the review of records including the doctors noted above, as well as the scanning, myelography, and other testing, it is obvious that the gentleman does have some spinal stenosis. However, that spinal stenosis is insignificant since no evidence of any nerve root [damage][1] has ever been documented and, in fact, is now documented as not being evident. Spinal stenosis is not significant unless there is either nerve root [damage] or conus medullaris abnormalities documented.

September 5, 2001 Report of David J. Schreiber, M.D. Dr. Schreiber's opinions expressly deal with the issue of Mr. Gray's congenital condition, and are therefore relevant.

Defendant further contends that Dr. Schreiber's testimony fails to meet the third prerequisite of the **Rule 702**/**Daubert** test for a variety of reasons, including, among other things, the length of Dr. Schreiber's examination of Mr. Gray, the amount of time spent reviewing Mr. Gray's medical records, and the presence of errors in Dr. Schreiber's report. This Court, however, finds that these purported deficiencies are overstated in the context of an examination and report of this type, and that there is nothing out of the ordinary about Dr. Schreiber's examination or report. The matters raised by Defendant may be the proper subject of cross-examination at trial, but they are not bases for excluding Dr. Schreiber's expert testimony.

[1]At deposition, Dr. Schreiber supplied this inadvertently omitted word.

Conclusion

Consequently,

IT IS HEREBY ORDERED that Defendant Exel's Motion to Strike the Report and Testimony of Plaintiff's Proposed Expert Witness David J. Schreiber, M.D. (Doc. No. 78) is **DENIED**.

Dated this 15th day of May, 2002.

/s/ Jean C. Hamilton
UNITED STATES DISTRICT JUDGE